IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.520 OF 2001.

Sou Sindhu Manohar Naiknaware
& ors. : Appellants.

versus

Prabhakar Bhagwanrao Ekatpure
& Anr. : Respondents.

Mr.Madhav Jamdar for the appellants.
Mr.N.V.Gangal for Respondent No.2/Insurance Co.

CORAM : D.G.DESHPANDE,J.

DATED : 21st March 2005.

ORAL ORDER

1. Heard advocates for the appellants and advocate for Respondent No.2. This appeal arises out of the judgment of Motor Accident Claims Tribunal, Solapur dated 13th May 1994 dismissing the petition of the appellants for compensation.

2. The appellants are the parents of deceased Shashikant, who was aged about 28 years of age at the time of incident and working as a civil contractor mason. He was proceeding on loona moped on Pandharpur Velapur Road. A truck bearing No.BYW 2644 of Respondent No.1 which was being driven by one Nana Kshirsagar suddenly halted near Navrang Hotel without giving any signal as a result the loona moped of deceased Shashikant, which was coming from behind, dashed against the backside of the truck. Shashikant fell on the road and in a injured condition he was removed to the hospital and subsequently he died. Therefore, in this background the claim petition came to be filed.

3. It was the defence of the owner and driver of the truck that at the relevant time the truck was parked in front of hotel Navrang of one Kasture; it was at extreme side to the road and deceased Shashikant, who did not have licence with him, and perhaps, therefore, who was not knowing as to how to drive the vehicle like loona moped, came from behind and as a mistake of his own dashed against the truck. Therefore, the

owner and subsequently the insurance company denied their liability.

4. The evidence was adduced on behalf of both the sides. The father examined himself. Admittedly, he was not present at the time incident and, therefore, he had no knowledge as to how the accident took place. However, one Sukhdeo Jawalakar was examined on behalf of the claimants and, he was an eye witness to the incident. As against this, the driver of the truck was examined so also the owner of the hotel to support the contention of the driver.

5. The tribunal dismissed the petition on the ground that there were contradictions in the stand taken by the claimant/father in his petition and in his evidence. The tribunal did not believe the evidence of eye witness examined on behalf of the claimants and, relied upon the stand taken by the owner cum driver and, the witness Kasture - the hotel owner. And it is against this order that the present appeal is filed.

6. Counsel for the appellants strenuously

urged that firstly the accident took place in a broad day light and, if at that particular time, the truck involved in the accident bearing No.BYW 2644 of the respondent No.1 was at the extreme side of the road in front of the hotel Navrang of Kasture - D.W.2; then there was no question of Shashikant committed any mistake of judgment and giving dash to the stationary or standing truck. He pointed out to me that as per the panchanama the width of the road at the relevant time was 12 ft. No one stated that other vehicles were coming from other directions and if the truck of the respondent No.1 was at the extreme left side, then there was ample space on the road for the loona moped- a smallest vehicle, to pass. Mr.Jamdar drew my attention to the cross examination of the solitary eye witness Sukhadeo who has stated that on 26-5-88 he was present in the cattle fodder market Pandharpur; one truck came from Velapur direction; deceased Shashikant was coming on scooter from the back side of the truck; the truck suddenly stopped and the scooterwala gave dash to the truck. In the cross examination of this witness on behalf of Respondent No.2 this witness was asked, whether he knows the truckwala had given the signal of

side lights while stopping the truck, while he was coming from Velapur to going to Pandharpur side. Counsel for the appellants, therefore, contended that this suggestion clearly shows as to what was the defence of the owner and driver of the truck. He also contended that there is no suggestion to this important witness, who was an eye witness of the accident, that the truck had already stopped; that it was at the extreme side of the road near hotel Navrang and, it was stationary and standing at that time Shashikant gave dash to the truck from behind of i.e. to the rear side of the truck. He also urged that this suggestion falsifies the stand taken by the owner-cum-driver of the truck that their truck was stationary at the time of incident.

7. As against this, the counsel for the insurance company contended that according to the story given by the driver, who was examined, he had parked the truck in front of hotel of Kasture; the time of the incident was 9 to 9.30 a.m. in the morning and while the driver was taking a cup of tea in the hotel, he heard noise. The driver, according to the insurance company, is supported by the owner of the hotel who has

stated that on 26.5.88 at about 9 to 9.30 a.m/ one truck bearing No.2644 was proceeding from west to east; the truck was parked in front of his hotel; one scooterwala arrived from west direction; he was tried to pass the truck by the side of the truck; he committed error of judgment and gave dashed to the rear side of the truck. The counsel for the insurance Company Mr.Gangal therefore contended that if the version of the driver is supported by the version of the hotel owner, then the tribunal was justified in dismissing the petition. Because no negligence could be prove as against the driver -cum-driver of the truck involved in the accident. Secondly, he contended that the father of Shashikant has admitted in the cross examination that Shashikant did not have valid driving licence and he could raise this defence about absence of driving licence. Because he could contend that Shashikant and not respondent was negligence in the accident.

8. It is true that the owner of the hotel has supported the version of the driver, but that is not the reason to accept the versions of both the driver and the hotel owner. The accident has

taken place on 26.5.88; the evidence was given by the owner after six years i.e. on 8.4.99; his statement was not recorded by the police, at least there was nothing on record to support this. If this hotel is on the road and the time of the incident was morning time and when he admits that the average customers about 100 to 150 in number visit to his hotel every day, then it is difficult to believe that he would be in a position, while doing his business of hoteling, to note the accident and give all the minute details in his evidence. Admittedly, the job of hotelist is to give services to the customer. But if the manner of his deposition is considered, then it appears that he was constantly looking at the road and observing the traffic and not doing his business. He could have at the most said that this driver came to his hotel on that particular day. But he crossed his limits and tried to be an eye witness of the incident by contending that the driver had parked the truck; locked it and came to the hotel, one scooterwala arrived from west direction, he was driving to pass the truck by the side of the truck; the scooterwala committed error of judgment and gave dash to the rear side of the

truck. This is not the evidence of an eye witness but of a person who is entrusted with a job of fixing the liability in the incident. What is the source of his knowledge; how he could decide that Shashikant committed error of judgment is for the witness to know. His evidence is, therefore, most unnatural and, therefore, not trusty of reliance. It is true that he has not been effectively cross examined, but oral evidence as given by him in the examination in chief does not inspire confidence.

9. So far as the evidence of driver is concerned, the story given by him is most unnatural. Whether Shashikant had a valid driving licence is of no consequence in the matter. Because this is not the case against the insurance company with whom his loona moped was insured. The victim was a civil contractor-cum-mason and the loona moped though the motor vehicle does not require much skill. It is just like a bicycle, can be drived by anybody and driving of the same can be learnt within a couple of days. The age of the deceased on the date of accident was 28 years, and, therefore, it cannot be held that Shashikant did

not know how to drive the loona moped.

10. Most important thing that was lost sight of by the tribunal was, if the road was 12 ft. width at the place of accident at that time, if the truck was at the extreme left side of the road near Navrang hotel which was to the north of East West Road and if, there was no evidence from anybody that other vehicles were passing through by the road at the relevant time and at the spot of accident, there was no reason for Shashikant to commit any error of judgment to cross the stationary truck from the empty portion of the road. It could be more than to 8 ft in any case, coupled with this suggestion given to the eye witness that truckwala had given signal of side lights while stopping the truck clearly shows that the defence raised by the respondents in their written statement is contrary to the facts. The suggestion given to the witness is in a contradiction to the defence raised and, therefore, this is a case where the driver and the owner of the truck are not coming with truth before the Court. The accident could have only occurred if the truck had stopped suddenly. Therefore, the defence raised is nothing but an

attempt to over come the liability. The judgment of the tribunal is therefore perverse as it has not taken into consideration this important aspect of the matter.

11. Regarding the extent of liability, Mr.Gangal for Insurance Company contended that no inference could be drawn about the negligence of the truck driver and therefore, the insurance company could not be held liable. I am not in agreement with this submission made by Mr.Gangal. This is clear that where the driver and the owner of the truck are required to be held as guilty of negligence, even if and this is in spite of the admission of the father that Shashikant was not having driving licence for driving the loona moped. Therefore, the finding of the tribunal are required to be set aside.

12. The next question arises is in respect of quantum of compensation to which the appellants are entitled. I heard both the advocates on this point also. The father (PW 1) of the deceased contended that Shashikant was working as a civil contractor and was also working as a mason; he was taking petty contracts; he was earning

Rs.100/- per day; he had engaged 5 to 5 masons with him; he was in sound health and, therefore, he was the only earning member of the family. In this background the father claimant claimed Rs.1,65,000/- by way of compensation. When cross examined on behalf of Respondent No.2, the father admitted that he has no document to show that his son used to work as contractor. A suggestion was put to him that Shashikant was working as a labourer occasionally and, in 1988 a male labour was getting Rs.8/- per day as daily wages; that the father was doing work of cutting the sugar-cane crop and he was getting Rs.30 to Rs.40/- per day. He denied the suggestion that his wife i.e. the mother of Shashikant was also earning ie. Rs.25 to Rs.30/- per day. Mr.Gangal therefore contended that firstly there is no evidence about the income of Shashikant; secondly, the oral evidence of father is not supported by documents and, thirdly, the father was himself earning and, therefore, he contended that the appellants are not entitled to the compensation which they have claimed.

13. As against this, Mr.Jamdar contended that when there is no effective cross examination of

the father of Shashikant and, therefore, looking to the age of Shashikant at the time of accident i.e. 28 years and the work which was doing, there is nothing wrong to assume on the basis of the evidence of the father that monthly earning of Shashikant could be anywhere between Rs.2500/- to Rs.2600/-. Even if 1/3rd of that amount is deducted towards personal expenditure by Shashikant remaining 2/3rd has to be taken into consideration while deciding the compensation.

14. It is true that there is no documentary evidence about the income of Shashikant. But documents in fact cannot be expected in every case. The oral evidence, if reliable and trust worth, can be accepted looking to the facts of the case that Shashikant was in the construction business as other contractors or masons and, looking to the fact that masons are paid more than casual labourers or regular labourers; the earning of Shashikant anywhere could be between Rs.2500/- to Rs.2600/- per month. 1/3rd of that amount has to be deducted i.e. Rs.850/- towards personal expenditure of Shashikant, remaining 2/3rd of Rs.2500/- comes to Rs.1650/-. The claimants in this case are the parents of

Shashikant. The age of the father of Shashikant at the time of accident was 55 years, and, therefore, multiplier that is applicable in this case, looking to the age of the father can be 12. Therefore, the mathematical calculations comes as under -

Rs.1650/- x 12 x 12 = Rs.2,37,600/-

Further, it is also the fact that at the time of accident Shashikant was not married. He would have married within a couple of years.. In ordinary circumstances and after the marriage his contribution to the family i.e. to the present claimants dependents would have reduced i.e. Rs.1250/- x 12 x 10 = Rs.1,50,000/-. Rs.1650/-x 12 x 2 = Rs.39,600/- before marriage plus Rs.1250/- x 12 x 10 = 1,50,000/-, it comes to Rs.1,89,600. Therefore, looking to the figure comes, the claim of the claimants is less and it has to be decreed. In any case the compensation so arrived at and payable is more than what is actually claimed. Because the parents will have to be compensated for the lost of own earning son i.e. towards loss of love and affection and in addition expenses incurred for funeral. But all

that would further add to the claim to which the appellants will be entitled. Since the appellants claimed Rs.1,65,000/- only and that claim is much below the figure that actually is calculated as above, this appeal is required to be allowed in-toto. Hence the order:-

:ORDER:

The appeal is allowed.

The impugned judgment and order of the tribunal dismissing the claim petition is set aside and quashed. The claimants' petition is allowed. The respondents will pay to the claimants Rs.1,65,000/- together with interest at the rate of 9% p.a. from the date of their claim till actual payment.

Both the respondents will bear their costs and cost of the appellants throughout.

[D.G.DESHPANDE]

21/03/2005 JUDGE.